

Public History in the Legal Arena

One of the most challenging experiences of my 23-year career as a historian with the National Park Service has been my involvement in *State of New Jersey v. State of New York, No. 120 Original*, a well-publicized case presently before the U.S. Supreme Court involving a boundary dispute and jurisdiction over the filled portion of Ellis Island. Located off the New Jersey shore, Ellis Island, a 27.5-acre expanse in New York Harbor, is administered, along with nearby Liberty Island, by the National Park Service as part of Statue of Liberty National Monument, one of our nation's most cherished and heavily-visited historic shrines. I am the first historian in the 80-year history of the National Park Service to be involved in a case before the court. My involvement in the case is an illustration of how public history research can serve legal interests and demonstrates that public history is gaining increasing recognition in the highest echelons of our nation's institutions.

On May 16, 1994, the U.S. Supreme Court agreed to hear a lawsuit filed by the State of New Jersey against the State of New York, under its Constitutionally-granted power of "original jurisdiction," meaning the case did not need to arise from a lower court. At issue in the lawsuit was a disagreement over the location of a common boundary between the two states on Ellis Island. Several months later, on October 16, the court appointed Paul R. Verkuil as "special master" to administer the case, take evidence, and preside at the trial.

Although this case involves a variety of issues regarding sovereignty and jurisdiction dating back to colonial times, the arguments of the two states come down largely to competing interpretations of an 1834 compact signed by both after an even-then long-standing dispute over state lands and water boundaries in New York Harbor. New Jersey agrees that New York retains authority over the land that was Ellis Island in 1834. Although the extent of that land remains in dispute between the two states, New Jersey contends that the 1834 island was approximately three acres in size. New Jersey also contends that the compact granted it jurisdiction

over the waters surrounding the island. In 1890, the federal government assumed control of the island for the purpose of constructing what would become the nation's largest and most significant immigration station and began artificially filling submerged underwater lands around the island to provide additional space for the station's structural development. Expansion of the island by artificial filling continued until the mid-1930s to accommodate expansion of the station through which more than 16,000,000 persons entered the United States between 1892 and 1954. Since the fill, much of which came from New York subway excavations, was placed on the submerged underwater lands around the island, New Jersey contends that the filled portion of the island lies within its jurisdiction.

On the other hand, New York claims that the entire 27.5-acre island has long been part of the Empire State. It contends that ever since Henry Hudson sailed into New York Harbor in 1609 to claim the land for Great Britain, a seamless web of political, economic, legal, commercial, and social relationships has weaved Ellis Island into the jurisdictional fabric of New York. While the 1834 compact established a boundary line between the states, New York contends that its control of Ellis Island was not limited to a fixed geographic dimension, arguing that the state retained sovereignty and jurisdiction over the entire Ellis Island, including any extensions that might be added by fill.

More than anything else, it appears that New Jersey is vying for the prestige associated with the nationally-significant historic site. A relatively small amount of state sales and income tax revenues is generated on the island, although the future could bring greater development and more tax opportunities. In urging the Supreme Court to hear its claim that New York is usurping the Garden State's rightful authority, New Jersey, which has long existed in the shadows of its northern neighbor, cited potential commercial and historic preservation projects that could yield revenues to the state with jurisdiction over the island.

During the late spring of 1994, both New Jersey and New York began extensive research efforts to provide documentation for their respec-

tive positions in the case. Depositions were conducted during the autumn and winter of 1995-96, and legal briefs were submitted to the court in March-April 1996. Because of the complexity of the dispute and the amount of evidence to be collected from both sides, Verkuil sought to hold the trial in the Supreme Court building rather than piecemeal in the states.

The trial, which was the first such legal proceeding to be conducted in the U.S. Supreme Court building in Washington, DC, since it was completed in 1935, was held in the West Conference Room from July 10 to August 15, 1996. The conference room is an elegant chamber just off the Great Hall that is paneled in American quartered white oak, in Georgian Revival style. Bordered by one of the building's two interior courtyards, the room features two crystal chandeliers from Czechoslovakia, a ceiling glazed in two tones of gold, and Corinthian pilasters with hand-carved capitals. Portraits of the last seven chief justices adorn the walls, lending a sense of historical dignity to the omately-furnished chamber.

My connections to Ellis Island include both familial and professional ties. In June 1909, my maternal grandmother, then 16 years of age, along with her entire family, left their home in the rural village of Toksaba in the Crimean Peninsula of southern Russia, and emigrated to the United States, entering their adopted homeland through the U.S. Immigration Station on Ellis Island. My ancestors had emigrated from West Prussia to the Ukraine in 1804, when Catherine the Great, the Russian czarina, was offering inducements to attract German farmers to settle and develop the agricultural resources of the Ukraine. Ultimately, the family had moved to the Crimea to become relatively prosperous farmers in a tightly-knit German Mennonite community. With the onset of Czar Nicholas II's Russification program and political and economic turmoil looming on the horizon, the family determined to emigrate to America to start a new life. The family took a lengthy trip by train to the port of Omsk on the Baltic Sea, from where they traveled by boat to Liverpool, England. I well remember conversations with my grandmother years ago during which she recounted her impressions and observations upon entering New York Harbor after the seven-day sea voyage from Liverpool aboard the *Choronia*, passing the Statue of Liberty, and viewing the Manhattan skyline as she was taken to Ellis Island for processing. Some of the awe, amazement, and excitement that she experienced during her passage up the harbor was

tempered by the fear and uncertainty that accompanied the medical and legal inspection process that awaited her on the island. Like many other immigrants, she, as well as other members of her family, had money sewn into the seams of her clothes for protection. Further distress was experienced when her father was apparently cheated while exchanging his Russian rubles for American dollars at the immigration station's money exchange before the family entrained for its new life on a farm in central Kansas.

Because of these experiences in my family's background, I eagerly accepted assignment of two National Park Service historical studies regarding the U.S. Immigration Station that operated on Ellis Island. In 1978, I began research on a study, entitled *Historic Structure Report, Ellis Island, Historical Data, Statue of Liberty National Monument* (printed May 1981). This report was the first study to focus solely on the historical evolution of the 33 extant U.S. Immigration Station structures on the island. Hence, the primary objectives of the study were to (1) provide basic historical documentation for the restoration/preservation of the buildings, and (2) provide preliminary data necessary for management to make informed decisions concerning historical significance, interpretation, and preservation treatment of the structures.

In 1981, I began research for what would become a three-volume study, entitled *Historic Resource Study (Historical Component), Ellis Island, Statue of Liberty National Monument* (printed September 1984). This study was prepared to provide historical data for an expanded information base for the preservation/stabilization and interpretation of Ellis Island. Its purpose was to provide a series of short monograph-type studies presenting research data on topics determined by National Park Service personnel to require further documentation.

Since their preparation, both studies have been used for the rehabilitation and restoration of Ellis Island's structures and development of its interpretive program. In addition to their use by the National Park Service, the studies have been used by academic historians, historic preservationists, and a variety of public and private institutions, national media organizations, ethnic and historical societies, and individuals conducting historical studies or projects relating to the island's history.

The first time that my Ellis Island research brought me into the legal arena occurred in September 1990 when I was subpoenaed by the U.S. District Attorney for the Southern District

of New York to testify as an expert witness in *Terry Collins v. Promark Products, Inc., v. United States of America*. In that case, the question before the Second Circuit Court of Appeals concerned whether the tort laws of New Jersey or New York applied to a controversy arising from an on-the-job accident suffered by a laborer (Collins) that occurred on the filled portion of Ellis Island while he was grouting tree roots with a mechanical device manufactured by Promark Products. Both New York and New Jersey appeared as amici curiae, asserting their jurisdictional and territorial rights over the filled portion of the island. I was subpoenaed because the Promark Products attorney apparently determined that my testimony might be relevant because of the widespread use that my two Ellis Island studies had received since their publication. In its decision, the Collins court held that the law of New York regarding workers' compensation would apply to the litigation. Although my involvement in that case was limited to preparation of a declaration and appearance for deposition by the Promark Products attorney in the offices of Collins' attorney in New York City, it set the stage for my participation in *New Jersey v. New York*.

After the Supreme Court agreed to hear the *New Jersey v. New York* case in 1994, a deputy attorney general and paralegal from the state attorney general's office in Trenton, New Jersey, met with me in June at the Denver Service Center, where I have been employed for more than 18 years. They questioned me concerning the nature and extent of my Ellis Island research, repositories where I conducted my research, and location of documentary materials that might be useful for the preparation of their case. Prior to my discussion with the representatives from New Jersey, they had obtained copies of my two studies from the Denver Service Center. I informed them that my studies did not address the legal issues that were central to the case before the Supreme Court and that I had no legal education or experience and thus would not provide legal opinions or conclusions. Nevertheless, I did provide perspectives and observations regarding my research methodology and findings and made recommendations to guide their research for the case.

In January 1995, New York Assistant Attorney General Judith T. Kramer, who has headed her state's team of attorneys working on the case, contacted me, asking questions similar to those posed by the representatives from New Jersey. Kramer indicated that she had obtained copies of my studies and had used them to

guide her research for the preparation of New York's case. She indicated that she had found my studies to be informative regarding many areas that could be vital to New York's defense, particularly in relation to sources revealing the federal government's own references to the island as a part of the City of New York. During the course of our conversation, she asked if I believed that my studies provided foundation for New York's contention in the case. I indicated that I believed my studies provided such foundation, although I reiterated that they did not address the legal issues of the case before the court and that I would not provide legal opinions or conclusions. Kramer indicated her desire to have my two studies introduced as "expert knowledge" documents at the trial to provide foundation for New York's case, and she stated that her inquiry would be restricted to the scope of my experience as an investigator and as author of the two studies. Thus, I agreed to testify as an expert witness for the State of New York concerning the research methodology used to prepare the two studies and historical conclusions that could be drawn from my research findings.

As the case unfolded, I was requested to prepare a statement and supplemental, summarizing my research methodology and findings and denoting historical conclusions that could be drawn from the two Ellis Island studies. During pre-deposition legal proceedings before the special master, New Jersey demanded that New York turn over xerox copies of all documents cited in the footnotes and bibliographies of both my studies, as well as all documents that I might have perused during the course of my research during the late 1970s and early 1980s. Since this demand could not be met, New Jersey moved that my testimony and two studies be excluded from the case. In response to this legal maneuvering, the special master issued an order of the court directing me to supply a representative sampling of documents cited in my studies that remained in the custody of the National Park Service. Additionally, the order directed me to appear in New York City for deposition by New Jersey on December 19, 1995, the day after federal budget negotiations between Congress and the White House broke down for the second time that autumn, resulting in closure of many parts of the federal government, including the National Park Service. As a result of the Supreme Court order, I was declared to be a federal "emergency" employee, and I was deposed by New Jersey Assistant Attorney General Joseph L. Yannotti, director of

his state's team of attorneys working on the case, in the offices of the New York State Attorney General in New York City. Because of a snow-storm, my deposition was cut short on the 19th, and it was not completed until January 23, 1996.

During July and August 1996, I provided approximately three full days of testimony, including direct, cross, and redirect examination, spread over four days in the trial at the Supreme Court. The range of questions addressed to me during the trial included my research methodology, factual analysis, conclusions, and interpretation based on my research, National Park Service planning, historic preservation, administrative policies, and the mechanics and rationale involved in preparing National Register of Historic Places nomination forms. Interestingly, my testimony and two studies were accepted by the special master as admissible evidence and expert knowledge during the trial despite another motion filed by the State of New Jersey during the trial to have them barred from the case. In part, the special master ruled that my testimony and two studies were admissible, because my research has received widespread recognition and use in the historical community and was conducted without regard for the issues or parties involved in the present litigation.

With the conclusion of the trial on August 15, the special master will prepare a report with recommendations that will be submitted to the justices of the Supreme Court. Both states will be afforded the opportunity to lodge appeals or exceptions to the report. The justices themselves

will hold oral arguments, likely in 1997, and thereafter render a decision in the case.

Although the legal proceedings in *New Jersey v. New York* continue, I have found my participation in the case to date to be memorable. Participation in a case before the Supreme Court, and particularly my appearance as an expert witness at the trial in the building's impressively-furnished West Conference Room, constitute one of the most unforgettable experiences of my career as a historian with the National Park Service. Testifying in the formal setting of that elegant chamber in the building that houses our nation's highest tribunal is an awe-inspiring event. It is pertinent to note that my testimony and two historical studies were recognized by the special master as having intrinsic and documentary value in support of New York's contention in the case despite vigorous challenges by the State of New Jersey. Admission of my testimony as an expert witness and of my two studies as expert knowledge documents illustrates one of the more unusual uses of public history by demonstrating how it can serve legal interests. Moreover, it demonstrates that the public historian's products have an importance beyond their immediate database function and may represent, in part, the factual dialogue upon which major legal decisions and matters of public policy are determined at the highest levels of our federal government.

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- a special event
- current and timely

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